

## **LBNL – PROCUREMENT STANDARD PRACTICES**

**Section: 11 Describing University of California Needs**

**Subject: 11.4 Liquidated Damages**

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**PURPOSE:** This standard practice (SP) provides guidance on the use of liquidated damages in Laboratory subcontracts.

**POLICY:** The Laboratory shall use liquidated damages in subcontracts when the delay of subcontract completion is critical to a Laboratory program or will cost the Laboratory unforeseen expenses and when the amount of liquidated damages is perceived to adequately reimburse the Laboratory should subcontract completion be delayed beyond the subcontract period.

**SCOPE:** This SP applies to subcontracts only when both:

- The time of delivery or performance is such an important factor in the award of a subcontract that the University may reasonably expect to suffer damage if the delivery or performance is delinquent and
- The extent or amount of such damage would be difficult or impossible to ascertain or prove.

### **DEFINITIONS:**

**Actual Damage** Actual damage is a loss directly attributable to a subcontractor's failure to perform that can be readily proven to have been sustained and for which the injured party should be compensated as a matter of right.

**Liquidated Damage** A liquidated damage is an express provision in a subcontract stating a sum for which one of the parties will be liable upon breach of contract or failure to perform. Liquidated damages are used in cases where the extent of actual injury is expected to be uncertain or difficult to quantify.

### **PROCEDURES:**

**General** Liquidated damages should be used only when both:

- The time of delivery or performance is such an important factor in the award of a subcontract that the University may reasonably expect to suffer damage if the delivery or performance is delinquent and
- The extent or amount of such damage would be difficult or impossible to ascertain or prove. In deciding whether to include a liquidated damages clause in a subcontract, the probable effect on such matters as pricing, competition, and the costs and difficulties of subcontract administration should be considered.

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**Section: 11 Describing University of California Needs**  
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---

### **Actual vs. Liquidated Damages**

Consideration should be given to using liquidated damages on projects for which it would be extremely difficult or impractical to determine actual damages, including those involving more than one subcontractor.

### **Computing Liquidated Damages**

The rate of liquidated damages used must be reasonable and considered on a case-by-case basis since liquidated damages fixed without any reference to probable actual damages may be held to be a penalty and, therefore, unenforceable. The subcontract may also include an overall maximum dollar amount or period of time, or both, during which liquidated damages may be assessed to ensure that the result is not an unreasonable assessment of liquidated damages.

If a subcontract prescribes an inadequate amount of damages, the subcontractor's liability is limited to the amount so prescribed even though the Laboratory may incur actual damages substantially greater than the prescribed amount. However, prescribing an amount that adequately compensates the Laboratory for its loss could limit the pool of competitive potential subcontractors, increase the cost or price of the proposals offered, or encourage the subcontractor to generate offsetting claims against the Laboratory to avoid the assessment of such damages.

When calculating the rate of liquidated damages, the following costs related to the delay should be considered:

- The estimated cost for inspection and superintendence of the work being performed;
- The cost of using substitute facilities;
- The cost of renting buildings or equipment;
- The cost of programmatic delays; or
- Potential federal or state fines related to delays.

**Determination of Reasonableness** — The amount of liquidated damages must be reviewed to ensure that the rate is reasonable. Documentation to support the amount of liquidated damages must be retained in the subcontract file.

**Construction Subcontracts** — For construction projects, the amount of liquidated damages is proposed by Facilities personnel.

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---

### **Solicitations and Subcontracts**

A provision must be included in the solicitation and subcontract that specifies the daily amount of liquidated damages and the conditions under which liquidated damages may be assessed. The provision must make an allowance for partial deliveries or performance. Damages suffered by the Laboratory may be mitigated by acceptance of partial deliveries or performance, presuming that the goods or services meet subcontract performance requirements.

### **Administration of Liquidated Damages**

**Termination** — The Laboratory has a responsibility to mitigate any damages suffered due to a subcontractor's delinquency. Accordingly, if it becomes apparent that the subcontractor is unable to perform, the subcontract should be promptly terminated for default and the goods or services reprocured with reasonable promptness. Mitigation does not require, however, that any savings resulting from reprocurement be offset against any liquidated damages that were properly assessed.

**Assessing Liquidated Damages** — When a delinquent subcontractor is permitted to complete a subcontract and the subcontractor has no excusable delay, liquidated damages are deducted from the subcontract price on a daily basis for delays incurred until the subcontract is completed.

**Shipment or Performance** — The shipment of unacceptable, defective, or nonconforming items does not stop the accumulation of liquidated damages. The subcontractor may neglect, refuse, or otherwise fail to fully deliver the required goods or services within the time specified in the subcontract. The subcontractor is obligated to produce the goods or provide services that meet the subcontract's stated performance requirements. Liquidated damages are intended to compensate the Laboratory for any delays incurred in obtaining acceptable products or services. This damage is not stopped by delivery of defective or unacceptable goods or services.

**Mutual Fault** — If the subcontractor's performance has been slowed both by its own inexcusable acts or omissions and also by excusable causes for delay (e.g., the Laboratory's failure to deliver government-furnished property when needed), the subcontractor is entitled to a time extension and a corresponding reduction in liquidated damages.

## **RESPONSIBILITIES:**

### **Procurement Specialist**

The procurement specialist must:

- Determine whether it is appropriate to include a liquidated

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**Section: 11 Describing University of California Needs**

**Subject: 11.4 Liquidated Damages**

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damages provision in a solicitation and subcontract;

- Determine the reasonableness of the liquidated damages to be assessed;
- Document the rate of liquidated damages in the subcontract file; and
- Monitor the subcontractor's performance for assessment of liquidated damages.